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**IN THE
COURT OF APPEALS OF INDIANA**

VICTOR BREWER,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A05-0603-CR-111
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Evan Goodman, Judge
Cause No. 49F15-0401-FD-1192

November 17, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Victor Brewer appeals his Habitual Offender adjudication following a jury trial.

Brewer raises three issues for review, namely:

1. Whether the trial court committed reversible error when it instructed the jury.
2. Whether the evidence was sufficient to support his habitual offender adjudication.
3. Whether the trial court committed reversible error in the format used for the verdict form.

We reverse and remand.

FACTS AND PROCEDURAL HISTORY

On January 4, 2004, Annette Holt, a co-owner of the Bargain Center store in Indianapolis, saw Brewer in the store's office standing by an open desk drawer that usually contained money. When Holt confronted Brewer, Brewer ran from the office. With the help of some customers and, after a scuffle with Brewer, Holt and her daughter were able to detain Brewer until police arrived.

Holt reported money missing from the desk drawer. The money was later found on the floor near where customers had struggled to detain Brewer. The State charged Brewer with Theft, as a Class D felony, and Battery, as a Class A misdemeanor, and alleged that he was an habitual offender. Following a bifurcated jury trial, the jury found Brewer guilty of theft and determined that he was an habitual offender. The trial court entered judgment of conviction accordingly and sentenced him to three years for theft with a three-year enhancement for being an habitual offender. Brewer appeals.

DISCUSSION AND DECISION

Issue One: Jury Instructions

Brewer contends that the trial court committed reversible error because it refused to give Brewer's proffered jury instruction based on Indiana Constitution Article I, Section 19. That constitutional section provides that "[i]n all criminal cases whatever, the jury shall have the right to determine the law and the facts." "[W]hen a defendant requests the trial court to instruct the jury on its role as finders of law and fact during the habitual offender phase of a trial, it is reversible error for the trial court to refuse the request." Warren v. State, 725 N.E.2d 828, 837 (Ind. 2000).

Here, the trial court refused Brewer's request for a jury instruction under Article I, Section 19. The State concedes that the trial court "may have committed reversible error" when it refused to give the proffered instruction. Appellee's Brief at 5. We agree. In Warren, the supreme court held that a trial court's refusal to give a similar instruction at the habitual offender phase of a trial constituted reversible error and, accordingly, ordered the habitual offender determination to be vacated. Likewise, here, we conclude that the trial court committed reversible error when it refused the proffered instruction. Therefore, following Warren, we vacate Brewer's habitual offender adjudication, reverse the enhancement of Brewer's sentence based on the habitual offender determination, and remand to the trial court for further proceedings consistent with this opinion. Because the remaining issues raised by Brewer may recur on remand, we address them here.

Issue Two: Habitual Offender Evidence

Brewer contends that his adjudication as an habitual offender was not supported by sufficient evidence. Specifically, Brewer maintains the State's evidence was insufficient to show that he had been convicted of two prior felonies. We cannot agree.

Indiana Code Section 35-50-2-8 provides that a person is an habitual offender if that person "has accumulated two (2) prior unrelated felony convictions." A felony conviction is "a conviction, in any jurisdiction at any time, with respect to which the convicted person might have been imprisoned for more than one (1) year." Ind. Code § 35-50-2-1(b). Because this case presents a sufficiency question, we do not reweigh the evidence but instead look at the evidence in the light most favorable to the verdict. See Toney v. State, 715 N.E.2d 367, 369 (Ind. 1999). An habitual offender determination must be vacated, however, if the appellate court deems the evidence insufficient to support the finding. Id.

Certified copies of judgments or commitments containing a defendant's name or a similar name may be introduced to prove the commission of prior felonies. Tyson v. State, 766 N.E.2d 715, 718 (Ind. 2002). While there must be supporting evidence to identify the defendant as the person named in the documents, the evidence may be circumstantial. Id. See also Coker v. State, 455 N.E.2d 319, 322 (Ind. 1983). If the evidence yields logical and reasonable inferences from which the finder of fact may determine beyond a reasonable doubt that it was the defendant who was convicted of the prior felony, then a sufficient connection has been shown. Tyson, 766 N.E.2d at 718.

Here, the State offered into evidence a 1998 arrest report for felony theft, a 2001 arrest report for felony theft, a 1999 abstract of judgment for felony theft, and a 2002 abstract of judgment for felony theft.¹ The arrest reports list Brewer's name and include a thumbprint.² The 1998 report lists Brewer's name and the same cause number as found on the 1999 abstract of judgment, and the 2001 arrest report lists Brewer's name and the same cause number as found on the 2002 abstract of judgment. Brewer acknowledges that he is the same Brewer referred to in the arrest reports, but he argues that the State did not prove that the abstracts represent convictions for those arrests. We cannot agree. Because the arrest reports list the same name and cause number as the abstracts of judgment, the State met its burden of showing that the abstracts of judgment correspond to and refer to the same Brewer as the arrest reports.

Brewer cites to United States v. Allen, 383 F.3d 644 (7th Cir. 2004), in support of his contention the State did not meet its burden to show that he was the same Victor Brewer who was twice convicted of felony theft. In Allen, the government presented a 1995 Indiana abstract of judgment for a felony conviction and a 1999 arrest report. Both the abstract and the arrest report named David L. Allen as the defendant. The 1999 arrest report also referred to a prior conviction for felony cocaine dealing in 1995, and it listed the cause number of the 1995 offense. The circuit court held that the arrest report only proved that Allen was "arrested on a warrant stemming from the 1995 conviction. It [did] not prove that Allen is the person who was convicted in 1995—unless it can be

¹ All four exhibits were certified copies of the originals.

² Additionally, the State presented thumbprint evidence and testimony regarding such evidence to show that the thumbprints of the individual referenced in the arrest reports match Brewer's thumbprint.

inferred beyond a reasonable doubt that the police arrested the right person.” Id. at 649 (emphasis in original). The court held that “the fact of the arrest is insufficient to support such an inference to the required degree of certainty.” Id.

We first note that we are not bound by federal authority, although we may look to it for guidance. See Stonger v. Sorrell, 776 N.E.2d 353, 355-56 (Ind. 2002). In any event, we conclude that Allen is distinguishable from the case before us. In Allen, the arrest report was created several years after the 1995 conviction, and the opinion does not indicate how the prior conviction was identified for placement on the arrest report. The officer preparing the arrest report may have relied solely on the defendant’s name when he listed the cause number for the prior conviction. But in the case before us, the arrest reports were created before each of the corresponding abstracts of judgment. A cause number was assigned in each case when the arrest report was created, and that cause number followed each case through to its conclusion. There is no question but that the arrest reports refer to the same case with the same defendant as the abstracts of judgment. Thus, Allen does not apply here.

In sum, Brewer acknowledges that he is the same Victor Brewer referred to in the arrest reports, and each arrest report references the same defendant and cause number as is listed in a corresponding abstract of judgment. Hence, the abstracts show the convictions corresponding to the respective arrest reports. And each abstract of judgment shows that Brewer had been convicted of felony theft. We conclude that the State presented sufficient evidence to prove that Brewer had two prior convictions for felony theft.

Issue Three: Verdict Form

Finally, Brewer challenges the verdict form given to the jury. Specifically, he alleges that the form improperly limited the jury's task to determining whether the State had proved the two prior felony convictions to support an habitual offender finding. Like the lack of an Article I, Section 19 jury instruction, Brewer contends that such limitation constitutes reversible error. We must agree.

In Seay v. State, 698 N.E.2d 732, 734 (Ind. 1997), addressing the propriety of jury instructions given at the habitual offender phase, our supreme court held that “even where the jury finds the facts of the prerequisite prior felony convictions uncontroverted, the jury still has the unquestioned right to refuse to find the defendant to be an habitual offender at law.”³ The same reasoning applies to the verdict form. Here, the verdict form submitted to Brewer's jury at the habitual offender phase provided:

We, the Jury, find that:

1. The State (has/has not) proved beyond a reasonable doubt that the Defendant, Victor Brewer, was convicted of [T]heft, a felony, on or about the 21st of November 2002, and sentenced thereon.
2. The State (has/has not) proved beyond a reasonable doubt that the Defendant, Victor Brewer, was convicted of Theft, a felony, on or about the 12th day of March 1999, and sentenced thereon.

Appellant's App. at 141. The verdict form clearly limited the jury to determining only whether the State had proved the prior convictions. It did not permit the jury to

³ In Seay, the supreme court affirmed this court's determination that there was no fundamental error in the jury instructions given at the habitual offender phase because, when considered as a whole, they included an instruction on the jury's right to determine the facts and the law. Here, we need not consider whether the verdict form constitutes fundamental error because we are reversing on other grounds. Further, here, the jury instructions do not include any instruction on the jury's right to determine the facts and the law.

determine Brewer's status as an habitual offender despite the existence of the requisite prior convictions. Thus, the trial court erred when it used that verdict form.

Conclusion

We hold that the refusal to give a requested instruction that the jury has the right to determine the facts and the law at the habitual offender phase constitutes reversible error. Thus, we vacate the habitual offender determination, reverse the enhancement to Brewer's sentence, and remand the case to the trial court for further proceedings consistent with this opinion. We further hold that the State offered sufficient evidence to support the jury's habitual offender determination. Thus, retrial of the habitual offender charge after remand does not offend the protections afforded by the Double Jeopardy Clause. See Harnon v. State, 849 N.E.2d 726, 735 (Ind. Ct. App. 2006). We also hold that the verdict form used at the habitual offender phase was erroneous.

Reversed and remanded.

KIRSCH, C.J., and DARDEN, J., concur.